Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 23, 1993

Ms. Ann Diamond
Tarrant County
Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201

OR93-544

Dear Ms. Diamond:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 21082.

The Tarrant County Sheriff's Department (the "department") received two open records requests for the personnel file of a recently hired deputy sheriff. You state that the department has released to the requestors some of the information contained in the deputy's file, but you request an open records decision from this office pursuant to section 7(c) of the Open Records Act regarding whether other information may be withheld from the public. This office has received a letter brief from the deputy's attorney contending that portions of the requested documents must be withheld. Specifically, the brief contends that the deputy's educational history, personal references, work history, and his answers to questions about possible prior convictions and related information come under the protection of sections 3(a)(1), 3(a)(2), and 3(a)(8) of the Open Records Act.[1] We understand that the department has chosen not to assert exceptions on its own behalf. *See* V.T.C.S. art. 6252-17a, § 7(c).

We initially note that section 3(a)(8) of the act, known as the "law enforcement" exception, is intended to protect certain *governmental* interests. This exception protects from public disclosure particular records the release of which would "unduly interfere" with law enforcement interests. Open Records Decision Nos. 434 (1986); 287 (1981). Under section 7(c) of the Open Records Act, third parties have standing to assert only their personal privacy or proprietary interests in the non-disclosure of information. *See,*

[1]Apparently, the requestors have agreed that the department may withhold the deputy's home address, telephone number, driver's license number, and social security number. Although the brief assumes that the disclosure of the address of the deputy's wife is also being requested, this office has confirmed with the requestors that they are not interested in obtaining this information.

e.g., Open Records Decision No. 542 (1990). Consequently, the deputy lacks standing to assert the protection of section 3(a)(8). Because the department has not raised this exception, it has been waived.

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." While the deputy's brief cites no specific statute that makes his personnel file confidential,[2] section 3(a)(1) also protects information implicating individuals' common-law and constitutional privacy interests. Common-law privacy protects highly intimate or embarrassing information about a person's *private* affairs such that its release would be highly objectionable to a reasonable person, but only if the information is of no legitimate concern to the public. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The information at issue pertains solely to the former employee's qualifications as a public servant, and as such is of legitimate public interest.[3]

Section 3(a)(1) protects constitutional privacy as well as common-law privacy. *Industrial Foundation*, 540 S.W.2d at 678-80. This constitutional right to privacy protects two related interests: (1) the individual interest in independence in making certain kinds of important decisions, and (2) the individual interest in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy." These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See Roe v. Wade*, 410 U.S. 113 (1973) and *Paul v. Davis*, 424 U.S. 693 (1976). None of the information at issue appears to implicate these "zones."

The second interest is somewhat broader. *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981). In Open Records Decision No. 455 (1987) at 6-7, this office discussed

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[2]Although the deputy's brief cites Open Records Decision No. 562 (1990) as authority for withholding the personnel file pursuant to statutory law, that decision involved police personnel files made confidential by section 143.089 of the Local Government Code. Section 143.089 pertains only to the personnel files of *municipal* police officers and fire fighters; thus this section is inapplicable to the Tarrant County Sheriff's Department. We further note that a similar but substantially different statute, section 157.904 of the Local Government Code, pertaining to the personnel files of sheriff employees, applies only to counties with a population of 2,000,000 or more, and thus does not apply to Tarrant County.

[3]Section 3(a)(2) protects, *inter alia*, "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The scope of section 3(a)(2) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 3(a)(2) is the same as that for information protected by common-law privacy under section 3(a)(1). *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin, 1983, writ ref'd n.r.e.). Because we have found that none of the information at issue is protected by common-law privacy, section 3(a)(2) is also inapplicable.

Fadjo v. Coon, *supra*, and other recent developments in federal decisions on constitutional disclosural privacy and concluded:

> When these cases are read together, the following becomes apparent: (1) in addition to the freedom to make certain decisions without government interference, an individual's Fourteenth Amendment liberty interest in privacy encompasses the freedom from being required to disclose certain personal matters; (2) the term `personal matters' is nebulous, but should at least be construed as involving `the most intimate aspects of human affairs'; (3) the public disclosure of personal matters is permissible if there is a `legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest'; (4) unlike the common law privacy test articulated by the Texas Supreme Court in *Industrial Foundation of the South v. Texas Industrial Accident Board*, *supra*, the test for determining whether private information may be publicly divulged without violating constitutional disclosural privacy rights is a balancing test; and (5) whether the subject of the information is a public official or an `ordinary citizen' will affect the nature of his privacy rights. [Citations omitted].

In Open Records Decision No. 455, this office held that each of the following categories of information have a direct bearing on an applicant's suitability for public employment and thus are *not* protected by either common-law or constitutional privacy: applicants' educational training; names and addresses of former employers; dates of employment; kind of work performed, salary, and reasons for leaving; names, occupations, addresses, and phone numbers of character references; job performances or abilities; birth dates, height and weight, and marital status. The deputy's educational history, personal references, and work history are similarly not protected and must be disclosed.

The deputy's answers to questions regarding possible prior convictions are also of legitimate public concern and thus are not protected by common-law or constitutional privacy. *Compare United States Dept. of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749 (1989) (criminal history of private citizen protected by privacy) *with Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir.), *cert. denied*, 439 U. S. 1129 (1979) (privacy rights of public employees not as broad as those of a private citizen).[4] This

[4]We note that although this office held in Open Records Decision No. 283 (1981) that criminal history information regarding a Dallas Park Police trainee had to be withheld pursuant to section 3(a)(1), that decision relied upon administrative rules that have since been repealed. We further note that federal regulations governing the release of criminal history information do not reach information that employees voluntarily reveal during the application process. *See generally* 28 C.F.R. 20.1 *et seq.*

information is not protected from public disclosure by section 3(a)(1) and must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,

Mary R. Crouter

Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/RWP/jcc

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